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March 18, 2014

*** Superintendent

THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION
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RE: **FINAL REPORT for** In the Matter of ***, 2014-01, Alleged Violations of the Individuals With Disabilities Education Act (IDEA) and Montana special education laws.

This is the Final Report pertaining to the above-referenced state special education complaint (Complaint) filed pursuant to the Administrative Rules of Montana (ARM) 10.16.3662. (Complainant) filed the complaint on behalf of her child, (Student), a student in ** Public Schools (the District). Complainant asserts the District violated the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. §1400 et. seq., Montana special education laws, Title 20, Ch. 7, Montana Code Annotated (MCA), and corresponding regulations at 34 CFR Part 300 and ARM 10.16.3007 et seq., by allegedly:

- (1) failing to provide Student with a one-on-one aide to ensure Student's safety, self-help and communication needs were met as provided in Student's Individual Education Program (IEP);
- (2) failing to adequately implement the Picture Exchange Communication System (PECS), an augmentative communication system, with Student as provided in his September 24, 2013 IEP;
- (3) utilizing behavioral goals on his September 24, 2013 IEP that were not reasonably calculated to enable him to receive educational benefit and failing to use positive behavior interventions and supports;
- (4) failing to adequately respond to allegations that the special education teacher disrupted the learning environment through her mistreatment of Student and by using aversive treatment procedures with Student as a means of punishment;
- (5) failing to educate Student in the Least Restrictive Environment (LRE); and
- (6) violating Student's confidentiality through discussions between the teacher and other parents or professionals while in the classroom;

A. Procedural History

1. On January 6, 2014, the Montana Office of Public Instruction (OPI) received a Special Education Complaint (Complaint). Complainant failed to serve the District a copy of the Complaint so OPI

provided a copy and the service date was used as the date of filing. The Complaint was deemed filed on January 17, 2014.

2. The OPI Early Assistance Program found the parties were unable to resolve their issues within 15 business days of the date of the Complaint. The Complaint proceeded to investigation.
3. The OPI received a written response to the Complaint on February 10, 2014.
4. An appointed investigator conducted interviews with: Complainant (Student's mother), Student's father, Student's vision consultant, Student's independent living advocate, the district superintendent, special education director, and the following elementary school staff: principal, physical therapist, occupational therapist, Student's current and former speech therapists, two speech assistants, and two paraeducators. The special education teacher was not interviewed but did submit written responses to questions submitted by the complaint investigator.

B. Legal Framework

The OPI is authorized to address alleged violations, which occurred within one year prior to the date of a complaint, of the IDEA and Montana special education laws through this special education state complaint process as outlined in 34 CFR §§ 300.151-153 and ARM 10.16.3662. Pursuant to 34 CFR §§ 300.151-153 and ARM 10.16.3662, all relevant information is reviewed and an independent determination must be made as to whether a violation of federal or state statute or regulation occurred.

C. Findings of Fact

1. Complainant is Student's mother and has standing to file this Complaint under the Montana special education complaint process at ARM 10.16.3661.
2. Student has been enrolled in the District since starting preschool in 2010.
3. Student is currently enrolled in 1st grade and is eligible for special education services. At the time this Complaint was filed, Student's then-current IEP was dated September 24, 2013.
4. Student's eligibility category is not listed on his IEP. An Evaluation Report dated April 10, 2013 lists Student's eligibility category as "multiple disabilities." Student was born with a seizure disorder, has a cortical visual impairment, is non-verbal, ambulatory delays and other developmental delays.
5. On May 21, 2012 Student's October 24, 2011 IEP was amended to include the full time assistance of a paraeducator beginning on September 4, 2012, when Student would begin kindergarten. The District assigned a specific paraeducator to directly assist Student during the 2012-2013 school year.
6. During Student's kindergarten year of 2012-2013, Student's former speech therapist verbally notified the District's special education director that she witnessed Student's special education teacher physically push a student into "time-out" in a corner, and she witnessed the teacher hold down a student who was kicking and screaming by standing with both feet on the student's legs to keep the student down. The speech therapist also verbally reported to the special education director her concerns with the special education teacher's classroom management throughout Student's 2012-2013 kindergarten school year.
7. Student's speech therapist witnessed the special education teacher using a fluffy ball, which Student reportedly did not like, with Student in an aversive manner. When Student screamed, the teacher would put the fluffy ball in his face.

8. At the start of his first grade year in fall of 2013, the District moved the location of the special education program Student attended to another school. Student attended school at the new location until December 12, 2013. Student had the same special education teacher for kindergarten and for the first half of first grade.
9. Student's first grade special education class had one paraeducator until the end of October, 2013.
10. Student's special education teacher and paraeducator both made requests to administration for more help in the classroom at the beginning of the 2013-2014 school year.
11. At the end of October, 2013, an additional paraeducator was added to the classroom.
12. On November 5, 2013 Student's vision consultant witnessed Student "acting out" by turning over chairs. She heard the sound of a slap, Student started to cry, and the special education teacher yelled at him saying "NO." The vision consultant then witnessed the teacher grab Student by his arm, put him in his desk chair, and sit on top of the desk so Student could not get out. When Student tried to get out of the desk chair she yelled "NO." This incident was not reported to the District until December 12, 2013.
13. On November 20, 2013, Student's speech therapist sent an email to the District's special education director reporting that during speech group on November 19, 2013, she witnessed the special education teacher slap Student's hand when he put a PEC card in his mouth. Student then cried and flailed and was put in his Rifton chair.
14. On November 22, 2013, in a video taken for educational observation of another student, Student's special education teacher is heard in the background saying to another student. "[Student], do you have to go in the time-out chair, and be strapped in?"
15. On December 12, 2013, Student's vision consultant witnessed the special education teacher grab Student by the arm and put him in his desk chair for a time-out. She again sat on top of his desk with her feet on his seat so he could not get out of his desk chair. When he tried to get out she yelled "NO." On December 12, 2013, the vision consultant reported this incident and the November 5, 2013 incident to the principal via a voice message, and to the district superintendent by phone call on December 13, 2013. The special education teacher was then placed on administrative leave during an investigation.
16. Complainant did not return Student to that classroom after the December 12, 2013 incident.
17. Sometime around December 16, 2013 the district superintendent verbally offered homebound services to the parents for Student.
18. On December 18, 2013 the district superintendent received a "Complaint Concerning Staff or Program" from Complainant regarding the alleged mistreatment of Student, as well as concerns regarding Student's behavior, the school environment, Student's safety, Student's lack of interest in school, Student's loss of skills, Student's IEP not being followed, and Student not being integrated with regular education students. Complainant wanted Student to return to school. The superintendent told Complainant the allegations would be investigated.
19. On or around December 19, 2013, the District's director of human resources interviewed the paraeducators who were in Student's classroom.
20. On or around December 20, 2013, the District's attorney interviewed the Student's vision consultant regarding the alleged incidents of mistreatment she witnessed.
21. On or around December 20, 2013, the District's director of human resources called Student's speech therapist regarding her November 5, 2013 email to the director of special education.
22. On or around December 24, 2013, the District's attorney interviewed Student's special education teacher. This was the only time the District interviewed the teacher.
23. On January 2, 2014 the special education teacher returned to the classroom.

24. Sometime in the first week in January the District's attorney interviewed Student's speech therapist.
25. On January 3, 2014, the parents, Student's independent living advocate, the district superintendent, principal, and District's attorney met. The District informed the parents that their complaint filed with the district was found to have no merit and Student's special education teacher was returned to the classroom. No written report of the investigation or findings was issued, reportedly because it involved personnel.¹
26. At the January 3, 2014 meeting, the parents stated they did not want their child to return to the same classroom because they did not want any contact with the special education teacher in question. The parties discussed having Student return to school with a different teacher. The parents later declined homebound services. The District then provided an application for a boundary waiver so Student could attend a different elementary school in the district, and Student did so on January 29, 2014.
27. The week of January 20, 2014, Student's speech therapist and two speech aides reported another incident of alleged mistreatment by the special education teacher against another student.
28. On January 23, 2014, the District's attorney interviewed Student's speech aides.
29. The special education teacher resigned her position on February 14, 2014 and was not made available for an interview for this investigation, but did respond to limited written questions.
30. Student was not integrated with regular education students at any time throughout the school day in fall of 2013, except for an occasional school-wide assembly.
31. During fall of 2013, Student's speech therapist and speech assistant saw the special education teacher strap student in a Rifton chair for time-outs.
32. During fall of 2013, Student's speech assistants saw the special education teacher pin Student up against the chalkboard.
33. During the fall of 2013, Student's speech therapist, speech assistants, and vision consultant saw the special education teacher physically restrain Student as a form of punishment when Student acted out.
34. In preschool, Student was introduced to PECS (the Picture Exchange Communication System) by the current speech therapist and, by his kindergarten year, Student's special education classroom teacher was supposed to start using PECS with him. The PECS program is contemplated to be used by classroom personnel so a student can generalize the information.
35. Student's September 24, 2013 IEP goal addressing PECS read: "By September 24, 2014 [Student] will be exposed to an augmentative communication program with 80% accuracy in over 10 trials as measured in the speech therapy logs."
36. The special education teacher did not implement PECS in the classroom during Student's first grade year. PECS was provided only during Student's speech therapy groups on Mondays and Tuesdays from 10:30-11:00 through December 13, 2013 when he was removed from the school.
37. Student's speech therapist reported Student was capable of benefitting from PECS, despite the fact that it took him a while to understand the concept.
38. The special education teacher asserts the District gave her no training on how to implement PECS. The speech therapist reported offering to help the special education teacher implement PECS with Student at least three times. The special education teacher did try a few times to implement PECS with Student, but stopped when Student put the cards in his mouth and threw the cards.
39. Student's October 1, 2012 IEP does not provide for the use of aversive treatment procedures or use of restraint. It does provide for the use of a "tumble form" and Student's Rifton chair "for stability and support." The IEP indicates Student's behavior impedes his learning or that of others.

¹ The complaint investigator requested copies of all documentation regarding the District's investigation of reports of maltreatment, but the District did not produce any such documentation on the basis of attorney-client privilege.

40. Student's October 1, 2012 IEP lists one social/emotional/behavioral goal: "(Student) will sit in a structured environment (calendar, story, assembl[ie]s etc.) with his peers, in a regular chair or on the floor for 5-10 minutes with no hand on support 4/5 days a week when measured by teacher observation over the course of the IEP."
41. Student's October 1, 2012 IEP indicates under Supplementary Aids and Services, "(Student) has one-on-one support at all times in the classroom, transitions, recess and meals in order for the best interest and safety of his well being."
42. Student's September 24, 2013 IEP does not authorize the use of aversive treatment procedures or the use of restraint. It does include the use of his Rifton chair "for support and posture during meal times only" and indicates Student's behavior impedes his learning or that of others.
43. Student's September 24, 2013 IEP has two social/emotional/behavioral goals: one goal reads the same as the goal in the previous IEP (see Number 40, above) and the other reads, "[Student] will learn the meaning of '(Student) no' when said verbally to him when he is tipping chairs, putting objects/hands in his mouth etc., 3 or fewer times and will be measured by teacher observation over the course of the IEP." Further, Student's Present Level of Academic Achievement and Functional Performance (PLAAFP) states, "If something is happening he will let you know. He will scream, cry, and throw whatever is in the close vicinity. The other troubles we have with [Student] is tipping over chairs, throwing anything and everything and always putting things in his mouth, hands included. We understand some of these are habits but he would benefit if we could decrease some of them. At times when these behaviors occur, the staff verbally says '[Student] no.' We are trying to be consistent in those words so he will eventually learn that he is not to do those activities. We are also doing the time out with [Student] and he is not a fan of it."
44. The principal, speech therapist, and vision consultant expressed doubt whether Student was able to understand the meaning of a "time-out."
45. The IEP team did not document any consideration of positive behavioral interventions and supports for Student or seek additional staffing or training to address Student's increase in aggressive behaviors in either the 2012-2013 IEP or the 2013-2014 IEP.
46. The "Supplementary Aids and Services" section in Student's September 24, 2013 IEP states "[h]e also will use the [R]if[ti]n[sic] chair for support and posture during meal times only." "(Student) requires the access to school support staff in close proximity through his entire day with transitions, classroom activities, meals and recess for his best interest and safety of his well being."
47. Student is currently not potty trained and is still learning how to use utensils and drink from a cup. He needs assistance during mealtime to help him with drinking and eating.
48. Student's September 24, 2013 IEP provided that a notebook be sent home with Student each day for communication. Around November 7, 2013, notebook entries document Student began hitting other Students when told "no." On subsequent days it is noted that Student would hit or pull hair when someone says "no." Student's adverse reaction to "no" is documented several times between November 7, 2013 and December 12, 2013.
49. Student's special education teacher reported Student's biggest behavioral issue was when he was told "no," he would scream and become destructive.
50. Student's aggressive behaviors, pulling hair, hitting, scratching and kicking increased during fall of his first grade year.
51. Student's parents reported Student did not want to attend school during the beginning of his first grade year, and around the start of November 2013, the parents became unable to tell Student "no" without him starting to cry.

52. In the communication notebook regarding Student, the special education teacher refers to Student as “demo man”, “a monster,” “being mean” and “stubborn” and spending lots of time in time-out.

D. Analyses and Conclusions

Issue 1: Did the District fail to implement Student’s IEP and deny Student a Free Appropriate Public Education (FAPE) by failing to provide Student with a full-time, one-on-one aide?

Complainant alleges the District denied Student FAPE by failing to provide a one-on-one aide to ensure Student’s safety, self-help and communication needs were met. The District argues Student’s needs were met.

Once an IEP is written, a district must begin to provide the special education and related services listed in the IEP, including implementing supplementary aids and services the IEP team has identified as necessary. 34 CFR § 300.323(c). The Ninth Circuit set forth the standard for failure to implement an IEP in *Van Duyn v. Baker School District*, 502 F.3d 811 (9th Cir. 2007). The Court held that in accordance with the IDEA and the Supreme Court’s decision in *Bd. of Educ. of Hendrick Huson Cent. Sch. Dist., Westchester County v. Rowley*, “...a material failure to implement an IEP violates the IDEA.” *Id.* at 822.

A material failure is more than a minor discrepancy between services a school provides and those required by the child’s IEP. *Van Duyn, supra* at 822. “[W]e clarify that the materiality standard does not require that the child suffer demonstrable educational harm in order to prevail. However, the child’s educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided.” *Id.* The *Van Duyn* court looked to factors such as the amount of weekly math instruction, any failures in implementing a behavior management plan, whether work was presented at the Student’s level and whether Student was provided with a self-contained classroom. *Id.* at 823-825.

While actual staffing decisions are the responsibility of the district, the decision as to the level of staff attention necessary for a particular student is left to each IEP team when developing the IEP in accordance with 34 CFR § 300.320 through § 300.324. The IEP must include a statement of special education and related services and supplementary aides and services. 34 CFR § 300.320(a)(4). Supplementary aides and services “means aids, services, and other supports that are provided in regular education classes, other education-related settings and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate...” 34 CFR § 300.42. The IEP team is required to determine the services appropriate for a student, including making decisions on whether or not one-on-one designated assistance may be needed.

2012-2013 IEP: January to June, 2013: (kindergarten)

During this timeframe, Student was non-verbal and only learned to walk about mid-year of his kindergarten year. He was not yet able to feed himself nor was he potty trained. On May 21, 2012, Student’s pre-school IEP was amended to include full-time assistance of a paraeducator on September 4, 2012, at the start of the 2012 kindergarten year, “to facilitate his integration in the classroom to help with his self-help needs, transitions, medical and safety concerns as he is dependent in all areas.” His next IEP of October 1, 2012, indicates under Supplementary Aids and Services, “(Student) has one-on-

one support at all times in the classroom, transitions, recess and meals in order for the best interest and safety of his well being.” The District assigned a paraeducator to assist him during his kindergarten year. Student was provided one-on-one, full-time assistance during the relevant time period. Therefore, **the District did not violate the IEP or deny Student a FAPE and is not in violation of 34 CFR § 300.17 from the relevant timeframe of January 18, 2013 through June, 2013, the end of Student’s kindergarten year.**

2012-2013 IEP: September 4, 2013 to September 24, 2013 (first grade)

Student’s October 1, 2012 IEP was still in effect when Student started first grade through September 24, 2013, when a new IEP was implemented. The requirement for “full time assistance of a paraeducator” continued. However, the investigation revealed Student’s first grade special education classroom had only one paraeducator and six other students. The investigation revealed the paraeducator was not able to assist Student full-time due to the needs of the other students. The special education teacher and the paraeducator requested increased staffing because they could not adequately meet the needs of the students. Student **did not** have full-time assistance of a paraeducator from the beginning of the school year to September 24, 2013. **The District failed to appropriately implement Student’s IEP in violation of 34 CFR 300.323(c)(2) from September 4, 2013 to September 24, 2013 as required in his IEP. This failure denied Student a FAPE in violation of 34 CFR §300.17.**

2013-2014 IEP: September 24, 2013, to October 31, 2013

The Supplementary Aides and Services in Student’s new September 24, 2013 IEP were changed to read “(Student) requires the access to school support staff in close proximity through his entire day with transitions, classroom activities, meals and recess for his best interest and safety of his well being.” The investigation revealed that the paraeducators and special education teacher confirmed Student’s needs and behaviors continued to demand full-time support. Various witnesses stated they had reported concerns to the District administration regarding the lack of adequate support staff in the classroom. Likewise, Complainant made similar requests to district administrators who did not provide additional support until the end of October, 2013.

From September 24, 2013, until a second paraeducator was placed in the classroom at the end of October, the evidence shows that Student did not have access to support staff “in close proximity” throughout the entire day as required by the IEP. The paraeducator who had worked directly with Student in kindergarten as an assigned, one-on-one aid observed that Student’s needs in first grade were greater than during kindergarten due to his increased mobility and increased aggressive behaviors. As the lone paraeducator for six other children, it was not possible to meet all students’ needs adequately. Furthermore, the paraeducator was required to leave the classroom to take students needing to work on potty training to a bathroom about a block from the classroom. Numerous witnesses expressed concern that the atmosphere in the classroom was not conducive to learning due to classroom-wide behavior issues and problematic classroom management. Student was often not engaged in learning activities. While various professionals such as speech assistants, a physical therapist, and an occupational therapist were in the class room at various times, they had their own duties and were not generally available for classroom management.

Given the importance of adult assistance for this non-verbal student as described in his IEP, the failure to provide appropriate support staff in close proximity throughout Student’s entire day was not simply a minor discrepancy in the implementation of the services required by Student’s IEP. This was a material

failure. **The District failed to appropriately implement Student's IEP in violation of 34 CFR 300.323(c)(2) from September 24, 2013 to October, 31, 2013 as required in his IEP. This failure denied Student a FAPE in violation of 34 CFR §300.17.**

2013-2014 IEP: November 1 to December 13, 2013

The September 24, 2013 IEP was crafted to **not** include direct, full-time, one-on-one assistance for Student. The District placed a second paraeducator in the classroom around the end of October, 2013. Witnesses reported there were still concerns about there not enough assistance in the classroom to attend to Student's needs and increased behaviors, and reported continued concerns about the lack of classroom management. While not an ideal situation, the District did provide access to support staff "in close proximity" during Student's day with additional staff services. The evidence does not support a conclusion that the District was in violation of the IEP at this time. **The District did not deny Student FAPE from November 1, 2013 to December 13, 2013 when student stopped attending that school.**²

Issue 2: Did the District deny Student a FAPE by failing to adequately implement Student's IEP when the teacher failed to utilize the PECS program as provided in Student's September 24, 2013 IEP?

Student is nonverbal and has very limited communication skills. PECS is a method to teach a student with communication impairment by using picture symbols. Complainant alleges Student was denied FAPE because the District did not implement PECS as required in his IEP. In response, the District provided documentation that PECS was utilized in speech therapy group but does not deny that PECS was not used in the classroom. PECS was not new to Student's IEP team in first grade. Student was first exposed to PECS in preschool and again in kindergarten. The October 1, 2012 IEP notes suggest, however, that Student might not have been developmentally ready to grasp the concept of PECS even in kindergarten, and that it appears Student was having trouble making the connection that pictures represented objects.

Student's September 24, 2013 IEP first grade speech goal reads: "By September 24, 2014 [Student] will be exposed to an augmentative communication program with 80% accuracy in over 10 trials as measured in the speech therapy logs." The PECS system was contemplated to be used by all personnel who taught Student. Complainant's understanding was that PECS was going to be used throughout the day.

The speech therapist reports that PECS is much more effective if everyone is using it with the Student. The speech team used PECS with Student in group sessions during his first grade speech therapy group on Mondays and Tuesdays from 10:30 -11:00. Student's speech therapist reported that Student was capable of benefitting from PECS, although it did take him time to understand the concept. She observed him making some progress with "highly motivating reinforcers" while in his speech group. However, speech therapy group was the only place PECS was being implemented. PECS was readily available in Student's classroom. Student's special education teacher reported she tried to use PECS "a couple times" but Student would only "eat the cards" or throw them. The two paraeducators in Student's

² Student's current IEP dated February 17, 2014, provides under "Supplementary Aids and Services" for Student to have "[a]dult supervision at all times and in all areas of his schooling day." The notes to the IEP further state, "It has been decided by the IEP team that [Student] will have a 1 on 1 teacher to student ratio for the duration of the 2013-2014 school year."

classroom were familiar with PECS as they had used it with other students. Under the supervision of the special education classroom teacher, however, they did not use it with Student. The classroom teacher said she received no specific training from the District on the correct way to implement PECS. The investigation revealed the speech therapist offered several times to assist the teacher with implementation of PECS for Student in the classroom. The teacher did not accept the offered assistance or implement PECS with Student in violation of the IEP.

As discussed in Issue 1, the standard for finding a violation of the IDEA due to a failure to implement an IEP is whether there was a material failure to implement. *Van Duyn*, 502 F.3d at 811. Being non-verbal, one of Student's greatest needs is to develop a way to effectively communicate. Although it was difficult at first to get Student to use PECS in the speech therapy group, he eventually grasped the concepts and was making progress in that setting. However, Student was in a special education self-contained classroom 100% of his day. His special education classroom teacher did not implement PECS in the classroom despite it being in his IEP. Student did make some minimal progress in his speech therapy group of two half-hour sessions per week. While it is difficult to predict the level of progress Student would have made had this communication program been fully implemented in his classroom as required, the lack of development of this elemental skill of communication affected his progress not only in this goal, but also hindered his ability to communicate and presumably affected progress in his other goals as well. This was a material failure to implement Student's IEP. **The District failed to adequately implement PECS as contemplated in Student's IEP thereby denying FAPE in violation of 34 CFR §300.17(d).**

Issue 3: Were Student's behavioral goals on his September 24, 2013 IEP reasonably calculated to enable Student to receive educational benefits or adequately implemented?

Student's September 24, 2013 IEP and October 1, 2012 IEP both indicate Student's behavior impedes his learning and that of others. Student had the same social emotional goal on both his kindergarten and first grade IEPs, ie. to be able to sit in a regular chair or on the floor for 5-10 minutes. The first grade September 24, 2013 IEP added an additional goal: "[Student] will learn the meaning of '[Student] no' when said verbally to him when he is tipping chairs, putting objects/hands in mouth etc., 3 or fewer times and will be measured by teacher observation over the course of the IEP." The social/emotional/behavioral Present Level of Academic Achievement and Functional Performance (PLAAFP) on the September 24, 2013 IEP states the obvious frustration with Student's behavior: "If something is happening he will let you know. He will scream, cry, and throw whatever is in the close vicinity. The other troubles we have with [Student] is tipping over chairs, throwing anything and everything and always putting things in his mouth, hands included. We understand some of these are habits but he would benefit if we could decrease some of them. At times when these behaviors occur, the staff verbally says '[Student] no.' We are trying to be consistent in those words so he will eventually learn that he is not to do those activities. We are also doing the time out with [Student] and he is not a fan of it." No positive behavioral interventions and supports, or other strategies were noted by the team to address Student's problematic behaviors.

Student's special education teacher reported Student's reaction to being told "no" was his biggest issue. Several witnesses questioned whether Student was even able to understand what a time-out meant. Paraeducators noted Student's aggressive behavior significantly increased in the fall of 2013,

particularly in reaction to being told “no.” The communication notebook sent home by the teacher documented that Student’s behaviors were intensifying. On November 7, 2013, two days after the first incident of mistreatment witnessed by Student’s vision consultant, the notebook documented that Student began hitting adults or other students when he was told “no.” Several times from November 7, 2013 to December 12, 2013, the notebook noted that Student had started to hit teachers and pulled hair when someone told him “no.” Complainant also noticed that, beginning in November 2013, she was unable to use the word “no” with Student without him starting to cry. She also noticed that Student did not want to go to school as he had in the past and got nervous and scared when the bus came to pick him up.³ In the communication notebook, the special education teacher referred to this six year old non-verbal child with developmental delays as “demo man,” “a monster,” “being mean,” and “stubborn”. She states he would spend lots of time in time-out.

In fall of 2013, the IEP goal to teach Student to respond to the word “no” did not stop the inappropriate behaviors. When Student’s behaviors intensified, neither the teacher nor the IEP team identified triggers, proposed changing tactics, requested District assistance, or convened a meeting to discuss behavioral interventions to deal with the undesired behaviors. The only time Student’s behaviors were discussed by the District was at Student’s annual IEP meeting on September 24, 2013. The special education teacher reported she did ask the parents for input on how to deal with the behaviors, but reported that the parents always told her he doesn’t do those things at home. Despite the special education director being informed of behavior management problems in the classroom by various credible professionals during the relevant timeframe, the District did not address the issue or ensure the teacher was equipped to identify the need to examine Student’s disruptive behaviors and attempt to figure out ways to positively redirect Student. The IEP team did not consider the use of positive behavioral interventions and supports to address the behaviors pursuant to 34 CFR §300.324(a)(2)(i).

To meet a FAPE obligation, a district does not have to provide the most potentially maximizing education available but does need to show that some educational benefit was conferred. *J.L. v. Mercer Island School Dist.*, 592 F.3d 938,951 (9th Cir. 2010). Here, Student was non-verbal and, as alluded to in the PLAAFP, used some maladaptive behaviors as a way of communicating. It was clear that telling him “no” exacerbated the negative behaviors and served as a trigger rather than a proper technique to elicit appropriate behavior. The Student’s behavior continued to deteriorate. The behavior goals and the use of physical restraint as a behavior management technique (despite evidence that Student was regressing behaviorally as a result⁴), served to elicit aggressive behaviors from this non-verbal Student. The IEP goal for Student to “learn the meaning of no” is the antithesis of a positive behavioral intervention. It provided Student with no educational benefit and increased his maladaptive behaviors to the detriment to his education. **Student was denied FAPE when the IEP team failed to consider the use of positive behavior interventions and supports to address problematic behaviors in violation of 34 CFR §300.324(a)(2)(i) and the behavioral goal was not reasonably calculated to enable the Student to receive educational benefits in violation of 34 CFR § 300.17.**

³ Complainant reports Student is now doing well and does not have these reactions to his current placement at a different school.

⁴ See Issue 4.

Issue 4: Did the District deny Student FAPE by failing to stop the special education teacher's mistreatment of Student? Did the District use aversive treatment procedures outside of Student's IEP as a means of punishment in violation of ARM 10.16.3346?

Complainant alleges Student was abused by his special education teacher on numerous occasions when the teacher slapped, yelled at, pushed, pinned him, and restrained him for punishment for various classroom behaviors. The District denies all allegations of abuse or mistreatment and in their Response state "to the extent that improper restraint has been used at any time in the past, the District will take any steps necessary to insure that improper restraints are not used in the future" and "...that the Rifton chair is used properly in the future." The Response also states "[Parents] have presumably reported their concerns to the appropriate agencies, including the local law enforcement group, and the [parent's] concerns, if meritorious, will presumably be addressed by the agencies receiving reports" and also states "the District did offer viable options to the [parents]" citing the fact that Student is now attending a different school and has a different teacher. The District does not address any potential effect of the alleged mistreatment on Student.

This investigation looks at mistreatment of a student in the context of the provision of special education services, not at potential acts of "child abuse" under the jurisdiction of the Department of Public Health and Human Services, Child and Family Services Division, or potential criminal assault under the jurisdiction of law enforcement.⁵

Reports of Mistreatment to the Special Education Director.

On November 20, 2013, Student's current speech therapist informed the special education director via email that on November 19, 2013, she witnessed Student's special education teacher slap Student's hand when he put a PEC card in his mouth during speech group.⁶ Student's response was to let go of the PEC card and begin to cry and flail, at which point the teacher strapped him in his Rifton chair. She reported the two speech aides also witnessed the incident. The special education director did not respond to the speech therapist's email and did not act on the report at that time.⁷

The investigation revealed that another professional, Student's former speech therapist during Student's kindergarten year, verbally reported two instances of mistreatment by same special education teacher to the director of special education during Student's kindergarten year.⁸ One incident involved the teacher physically pushing a student back into a corner for time-out, and a second incident where the teacher stepped on a child's legs with both feet and her full weight to hold the child down. The speech therapist stated she talked with the special education director about both instances, but felt the director was nonchalant about the reports and did not take her seriously. The director of special education denies the reports. This professional also observed the special education teacher used a fluffy ball, which Student

⁵ Any potential maltreatment of a student by a school district employee is the responsibility of the district to address, regardless of what other entities may have overlapping jurisdiction.

⁶ Her email states, "The antecedent to the behavior is inappropriate such as the grabbing, but if you are punitive: grabbing the student or slapping or the in your face 'no' the student starts to cry and their participation in the activity is over. I'm not sure the developmental level of the student's attention span is being taken into consideration. In our early morning speech group of which the[re] were 7 last week. WE have a hands off policy...."

⁷ The district superintendent could not recall when she was notified of the November 20, 2013 email from the speech therapist.

⁸ The former speech therapist also noted that she verbally reported her concerns about the special education teacher's inappropriate classroom management to the director of special education several times throughout the year.

appeared to dislike, in an aversive manner, such as when Student screamed the teacher would put the fluffy ball in his face.

Reports of Mistreatment to the Superintendent and Principal

On December 12, 2013, Student's vision consultant reported two incidents of mistreatment to the school principal, and to the district superintendent on December 13, 2013. She reported the November 5, 2013 incident where she witnessed Student "acting out" by turning over chairs. She heard the sound of a slap and Student held his hands close to his body and began to cry. She saw Student's teacher grab Student by his arm, put him in his desk chair, and then sit on the desk so Student, who was pushing against the teacher trying to get out, could not get up. When he tried to get out of the chair the teacher yelled "NO."

She also reported a second incident occurring on December 12, 2013, where she witnessed Student's teacher grab Student's arm and put him in his desk chair for a time-out, and again sat on top of his desk with her feet on Student's seat so he was restrained and unable get out. Again, when Student tried to get up she yelled "NO" at him. The vision consultant also reported the incidents to the parents that day. The District took action after parents removed Student from school and filed a complaint with the District.

The record shows that these and other witnesses describe this special education classroom as a demeaning environment, with the special education teacher often yelling at the Student and "rough" with several children including Student. They report the environment was not conducive to learning. Student's speech aides report they entered the classroom one day and found the teacher pinning Student up against the chalkboard. The speech assistants also saw Student restrained for punishment when they were in the classroom.⁹ Student's September 24, 2013 IEP provides for use of his Rifton chair only while eating. However, the speech therapist stated it was frequently used for time-out and punishment.¹⁰ This activity was verified in a video taken of another student for educational observation, in which Student's special education teacher threatened a student with time-out and asked him if he wants to be "strapped in" the chair. The only chair in the classroom with straps is the Rifton chair. The current speech therapist observed Student restrained for punishment, such as time-outs, about half the time she was in the classroom, either by the teacher sitting behind the child and holding him or by placing him in the Rifton chair with the stomach belt strapped on.

District Action After December, 13, 2013.

On December 13, 2013, Complainant removed Student from school and filed a complaint on approximately December 18, 2013, with the district superintendent.¹¹ The District placed the special education teacher on administrative leave beginning December 13, 2013, and their attorney began an investigation into the alleged mistreatment. On or around December 19, 2013 the District's director of human resources interviewed the paraeducators who were in the classroom at the time of the incidents.¹² The District's attorney interviewed the vision consultant on or around December 20, 2013 and the District's director of human resources called the current speech therapist to ask about her November 20,

⁹ One assistant reported physical restraint in a "Mandt" hold and the other reported restraints in the Rifton chair.

¹⁰ At times, Student seemed to like the Rifton chair and would go sit in it independently. However, the IEP specified it was only to be used for feedings.

¹¹ The complaint to the district covered many issues in addition to concerns about alleged "abuse." It listed concerns regarding: Student's behavior, the school environment, Student's safety and lack of interest in school, lack of skills, non-implementation of his IEP and non-integration with regular education Students.

¹² The investigation revealed the District's attorney did not interview the paraeducators. The District's director of human resources did ask two short questions about whether they had witnessed Student being slapped or abused in the classroom.

2013 report of mistreatment. The District's attorney did not interview her or other speech assistants that were in the classroom at the time. The District did not interview the occupational therapist or physical therapist who were also in Student's classroom at various relevant times.

On January 3, 2014, Student's parents, their advocate, the school's principal, district superintendent and the District's attorney had a meeting as which the District informed the parents that their complaint had no merit and that the teacher had been returned to the classroom the day before. No written report was issued and no appeal was offered. Complainant did not believe it was safe for Student to return to the classroom after the December 12, 2013 incident and kept him at home while trying to work out a solution with the District. The district superintendent verbally offered Student homebound services sometime around December 16, 2013, but the parents wanted Student in school and declined the offer. Student did not return to school until January 29, 2014, when the parties arranged for him to attend a different elementary school within the district.

Additional Allegation of Mistreatment in January, 2014.

After the special education teacher returned to the classroom in January, 2014, the District's attorney interviewed Student's speech therapist about her November 2013 mistreatment report but did not interview the speech aides that were also present in the classroom. However, the District did interview the speech aides sometime around January 20, 2014. That same week, another incident of alleged mistreatment by the special education teacher against a student was reported by the speech aids and the speech therapist around January 23, 2014. The special education teacher resigned on February 14, 2013 during the pendency of the state complaint investigation.

Mistreatment as Denial of FAPE

A safe, maltreatment-free classroom is a basic element of an appropriate education. *Shadie v. Forte and Hazelton Area School District*, 2013 WL 1729368 at 6 (M.D. Pa.)(not reported). Where, as here, alleged acts constitute discipline and not random acts of violence, courts have generally held that claims based upon such conduct fall 'within the IDEA' and exhaustion of administrative remedies under IDEA would need to occur. *Sagan v. Sumner Co. Board of Ed.*, 726 F.Supp.2d 868, 879 (M.D. Tenn. 2010).

To determine whether acts of alleged mistreatment violate the IDEA, the mistreatment must be shown to interfere with the Student's right to FAPE. *Doe v. Clark Co. Board of Ed.*, 2007 WL 2462615 *5 (D. Nev.)(unreported). "When a parent alleges that a School District's abuse of a disabled child interfered with the child's right to FAPE, IDEA can provide relief in the form of education and additional services to compensate any educational deficits caused by the past abuse." *Fulton County School District, Fa. SEA, OSAH-DOE-SE-1135718-60-Schroer*, (Feb. 1, 2012) citing *Bowden v. Dever*, 2002 U.S. LEXIS 5203 (D. Mass. 2002). At least one court has determined it is a possibility that just *one* incident of physical mistreatment may constitute a violation of a student's IEP and in turn the IDEA. *Shadie v. Forte*, 2013 WL 1729368 (M.D.Pa.) *supra*.

Here, the District received a number of reports about mistreatment of Student and others in this special education classroom. The District failed to respond to the November, 2013 reports of mistreatment and did not convene an IEP meeting to address any effects the alleged mistreatment may have had on Student. Previously, the special education director failed to respond to mistreatment allegations while Student was in kindergarten. With regard to the November, 2013 allegations, the special education director was dismissive of the professionals' reports and requests regarding their observations of

mistreatment and chaotic classroom management. It appears the mistreatment reports made to the special education director were not promptly relayed to the district superintendent for action. When subsequent reports of mistreatment and a district grievance were made to the district superintendent in December, 2013, an investigation was initiated, but the teacher in question was returned to the classroom.

While a district has obligations with respect to personnel matters, it also has obligations with respect to maintaining a safe environment where disabled students can receive FAPE. The mistreatment reported in this classroom was allowed to continue unabated until after this Complaint was filed. The District failed to recognize its FAPE obligations with respect to the mistreatment allegations and erroneously left it to the parents to enforce with agencies outside the District. The teacher's mistreatment of students and District inaction lead to a pervasive disruption of the educational environment for Student and others in the classroom. Student's anxiety level increased in the school environment. He regressed in learned skills. His nonverbal communications became increasingly combative and his negative behaviors escalated. This demonstrates the mistreatment clearly impeded Student's ability to obtain meaningful benefit from his educational program. **The District denied FAPE when it failed to adequately address the special education teacher's mistreatment of Student in violation of 34 CFR 300.17 and ARM 10.16.3346.**

Aversive Procedures

Corporal punishment, defined as knowingly and purposely inflicting physical pain on a student for disciplinary measures, is prohibited in Montana pursuant to § 20-4-302, MCA. Additionally, Montana special education regulations prohibit the use of aversive treatment procedures. Aversive treatment procedures "must be designed to address the behavioral needs of an individual student, be approved by the IEP team, and may not be used as punishment, for the convenience of staff, or as a substitute for positive behavioral interventions." ARM 10.16.3346(1). The regulation prohibits "any procedure solely intended to cause physical pain." ARM 10.16.3346(3)(a). The teacher slapping Student's hand during the use of PECS was punishment for his actions and therefore is prohibited and may not be used even as an IEP aversive procedure. Further, "[m]echanical restraint that physically restricts a student's movement through the use upon the student of any mechanical or restrictive device which is not intended for medical reasons" are prohibited pursuant to ARM 10.16.3346(4)(e). The special education teacher's use of the Rifton chair to restrict Student's movement and execute "time-outs" were prohibited uses of mechanical restraint.

Aversive treatment procedures may be used if included in an IEP only after a functional behavioral assessment has been conducted on a student and at least two written positive behavioral intervention strategies have been previously implemented to target the behavior to be changed. ARM 10.16.3346(6). Aversive treatment procedures may include: physical restraint, except as prohibited by Montana's corporal punishment statute,¹³ and only when the IEP team has determined the frequency intensity or

¹³ Except as spelled out in Montana Code Annotated, § 24-3-302(4) (a) which states:

A person who is employed or engaged by a school district may use physical restraint, defined as the placing of hands on a pupil in a manner that is reasonable and necessary to:

- (i) quell a disturbance;
- (ii) provide self-protection;
- (iii) protect the pupil or others from physical injury;
- (iv) obtain possession of a weapon or other dangerous object on the person of the pupil or within control of the pupil;
- (v) maintain the orderly conduct of a pupil including but not limited to relocating a pupil in a waiting line, classroom,

duration of the restraint warrants an aversive treatment procedure. ARM 10.16.3346(2)(a). Student's IEP did not permit the use of aversive treatment procedures but they were frequently used with Student in the classroom. No behavioral assessment was conducted on Student to determine the reasons for his behaviors or what positive behavioral supports could be applied to alleviate the problem behaviors. The allegations of mistreatment reported herein are found to be credible and constitute aversive treatment in violation of ARM 10.16.3346.

In sum, the District failed to adequately respond to the numerous reports of alleged mistreatment, and the teacher used unauthorized adverse treatment procedures, mechanical restraints and procedures that caused physical pain and discomfort for punishment **in violation of ARM 10.16.3346 and denied Student FAPE in violation of 34 CFR § 300.17.**

Issue 5: Did the District fail to educate Student in the Least Restrictive Environment (LRE) from fall 2013 to December 13, 2013?

Complainant alleges that the District denied Student a FAPE pursuant to 34 CFR §§ 300.114 and 300.117 by placing Student full-time in a self-contained special education classroom and completely segregating him from non-disabled students. The District asserts they were working toward integrating Student but, because they had just moved the entire self-contained special education classroom to a new school, they wanted to make sure safety issues were addressed for all, including making sure the boundaries were secure at recess due to a few students that tended to run away. The District stated the plan was to eventually integrate the self-contained classroom students for lunch and recess citing administrative issues regarding playground safety and teacher prep time for courses (music and physical education) with physical accessibility concerns.

The move to a new classroom was made in September, 2013. No changes for integration were made until sometime after December 12, 2013, when Student stopped attending that classroom. Between September and December Student had no regular contact with non-disabled students, remaining completely segregated throughout the entire school day except for an occasional school-wide assembly.

Least restrictive environment (LRE) provisions of the IDEA require a school to ensure children with disabilities are segregated only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR 300.114(2)(ii). Complainant does not object to Student's placement in a self-contained classroom given Student's needs, but does object to the failure to integrate him in other non-academic activities.

LRE regulations also apply to nonacademic settings. "In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in 34 CFR 300.107, each public agency must ensure that *each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child...* 34 CFR § 300.117.

CONT. lunchroom, principal's office, or other on-campus facility; or

(vi) protect property from serious harm.

The techniques used by the teacher were likewise not appropriate restraint techniques and likely could also be said to be too much restraint under this statute.

(emphasis added) Further, if a district does not integrate a child in such activities, the child's IEP must specifically explain the extent to which the child will not participate with nondisabled children in extracurricular and other nonacademic activities. 34 CFR § 300.320(a)(5). The appropriate placement will vary from child to child and maybe even from year to year for that child. A continuum of services is contemplated to enable a district to provide maximum exposure for an individual student dependent on the student's needs and capabilities. If the district has provided the maximum exposure to non-disabled students their obligations are fulfilled. *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1050 (5th Cir. 1989); *Oberti v. Board of Educ.*, 995 F.2d 1204, 1214 (3rd Cir.1993); *Sacramento City Unified School Dist. v. Rachel H. Holland*, 14 F.3d 139, 14048 (9th Cir. 1994); *J.W. v. Fresno Unified School District*, 626 F.3d 431 (9th Cir 2010).

Student was segregated from regular education students at all times throughout the school day including recess and lunch. The relevant IEPs and notes do not explain the complete segregation, or the extent to which he would participate with nondisabled children. The District segregated Student and all the self-contained classroom students for administrative purposes without the required IEP statements or an analysis of the extent to which it was appropriate for each student. Therefore **the District violated 34 CFR § 300.320(a)(5), 34 CFR 300.114(2), and 34 CFR § 300.117 by failing to provide Student opportunity for participation with nondisabled Students to the maximum extent appropriate to his needs.**¹⁴

Issue 6: Did the District violate Student's confidentiality through discussions between the teacher and other parents or professionals while in the classroom?

Complainant alleges the special education teacher violated Student's confidentiality through discussions with other parents and professionals in the classroom. Complainant alleges that she witnessed the teacher breaching confidentiality when she was in the classroom. Other witnesses also reported the teacher breached confidentiality to them. In response, the District provided a copy of the District Confidentiality Agreement which the teacher signed on August 8, 2013.

Special education regulations address confidentiality as it pertains to student records. See 34 CFR §§300.611 through 300.627 and ARM 10.16.3560. Here, Complainant's allegation is not about educational records but appears to allege unprofessional comments by the teacher about other students in the classroom, such as stating a student is "always dirty" or is "not being cared for by [students'] parents." The OPI does not have authority over these personnel matters and would refer Complainant back to the District for appropriate redress.

¹⁴ It is noted Student had physical accessibility issues including access to the music room and gym which Complainant addressed in another forum.

E. Disposition

The District is ORDERED to take the following actions:

1. Student's September 24, 2013 IEP special education services totaled 1590 minutes per week, his Communication service minutes were 600, and other IEP-related services were for 150 minutes. The weekly minutes total was 1740 minutes or 29 hours per week. To bring Student to where he would likely have been, had appropriate services been provided, the District shall, in addition to his current IEP services, **offer Student 300 hours of compensatory services** for development of communication skills, speech and language development, development of social, self-help and independence skills including use of positive behavior interventions and supports, adaptive PE, occupational therapy, physical therapy, sensory motor opportunities, opportunities for interaction with regular education students, and opportunities to develop social, emotional and behavioral skills.
2. After consultation with parents, the District shall submit its plan for compensatory services to the OPI Dispute Resolution Office (the Office) for approval by **April 20, 2014**.
3. The District shall provide PECS training for all special education and support staff by **September 20, 2014**.
4. The IEP team shall:
 - a. clarify Student's IEP to clearly state that all individuals working with Student will use PECS. The IEP team shall consider including PECS as a general communication goal;
 - b. explore the need for assistive technology to assist with Student's communication needs;
 - c. determine the appropriate opportunities for Student to participate with regular education students and record it on Student's IEP;
 - d. conduct a behavior assessment for Student, draft appropriate behavior goals and integrate recommended positive behavioral interventions into his IEP; and
 - e. submit these changes to the Office for approval **by April 20, 2014 and implement approved changes by September 1, 2014**.
5. The District shall review its policies to address reports of mistreatment of disabled students and implement procedures to ensure allegations of mistreatment of students with disabilities are immediately reported to top district administration and promptly acted upon in keeping with this Final Report. The proposed changes shall be submitted to the Office for approval **by May 20, 2014**. The District shall provide training on these policies and procedures to all District staff **by September 20, 2014**.
6. The District shall provide training to all administrators, special education staff and paraeducators regarding positive behavioral interventions and supports, identifying trigger

behaviors, strategies to address problematic behaviors, drafting behavioral goals, initiating staffing of intractable behaviors, procedures to seek additional staff support or training with behavioral challenges of students they serve. The training agenda and trainer's name shall be submitted to the Office for approval and training shall be completed by **September 20, 2014**.

7. The District shall train all staff who are likely to encounter special education student behavior issues in the proper use of physical and mechanical restraint and in appropriate use of aversive treatment procedures by **September 20, 2014**.
8. Keeping in mind that the role of an administrator at the IEP meeting is to commit the resources of the District, the District shall create explicit procedures to ensure that the staffing levels for implementing special education programs are sufficient to ensure that each child receives FAPE as determined by the child's IEP team. The procedure shall include who to contact, timelines for District responds to requests, how staff and the IEP team will be informed. The District shall submit information to the Office delineating these procedures and detail how it will fulfill IEP requirements involving the role of the administrator in the IEP meeting for approval **by April 20, 2014**. The District shall train all District special education personnel and administrators on the above information **by September 20, 2014**.
9. **By April 1, 2014**, the District shall provide to the Office the list of other students in the first grade special education classroom attended by Student in the fall of 2013, the IEPs for these students and parental contact information for the students. The OPI will investigate the potential denial of FAPE for these students. The District shall cooperate with the investigation, inform the parents of the allegations of mistreatment and problematic nature of the classroom environment and take any action ordered by the OPI upon completion of the investigation including an offer of compensatory services for identified deprivations.
10. The District shall report **by the 20th of each month starting in April 2014**, until such time as the OPI has determined compliance has been achieved with respect to its activities to comply with each action ordered in this Final Report and shall comply with any further recommendations from the Office.

Ann Gilkey
OPI Compliance Officer

c: Mary Gallagher, Dispute Resolution/EAP Director
Frank Podobnik, State Special Education Director
***, Board of Trustees, *** Public School, Chair